Supreme Court, U.S.
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No. 95-383

In The

# Supreme Court of the United States

October Term, 1995

MARK LEVEY BY THE PERSONAL REPRESENTATIVE OF HIS ESTATE and ALMA AND FRANK LEVEY, PARENTS OF MARK LEVEY, DECEASED,

*Petitioner,*

vs.

STATE DEVELOPMENTAL CENTER, GRAFTON, NORTH DAKOTA,

*Respondent.*

**On Petition For Writ Of Certiorari To The North Dakota Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does the Fifth or Fourteenth Amendment to the United States Constitution restrict a state supreme court's authority to limit the retroactive application of its decision changing its interpretation of its state constitution and state common law?

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Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the North Dakota Supreme Court's opinion in this case. That opinion is reported at 533 N.W.2d 707 (1995).

## STATEMENT OF THE CASE

Because Petitioner's case was dismissed on the basis of the State of North Dakota's sovereign immunity, the facts underlying Petitioner's claim as stated on pages 3 to 6 of the Petition have not been adjudicated by any court and Respondent disputes many of those facts. However, that dispute and the accuracy of Petitioner's alleged facts are irrelevant to this Court's consideration of the legal question presented in the Petition. The facts significant to the question presented are stated below.

In December 1991 Petitioner brought a state court wrongful death action against Respondent seeking money damages. Respondent moved to dismiss the suit on sovereign immunity grounds.

Under North Dakota sovereign immunity law in effect at that time, the North Dakota Supreme Court had interpreted N.D. Const. art. I, § 9, as giving the North Dakota Legislature the exclusive power to authorize tort suits against the State and found that the Legislature had not authorized most tort actions, including wrongful death actions, against the State. *See Effertz v. North Dakota Workers' Comp. Bureau*, 481 N.W.2d 223, 224 (N.D. 1992);

*Livingood v. Meece*, 477 N.W.2d 183, 189 (N.D. 1991); *Leadbetter v. Rose*, 467 N.W.2d 431, 434-37 (N.D. 1991), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Schloesser v. Larson*, 458 N.W.2d 257, 258-59 (N.D. 1990), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Patch v. Sebelius*, 320 N.W.2d 511, 513-14 (N.D. 1982); *Senger v. Hulstrand Constr., Inc.*, 320 N.W.2d 507, 508-10 (N.D. 1982), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Wright v. State*, 189 N.W.2d 675, 677-79 (N.D. 1971), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Heasley v. State*, 115 N.W.2d 334, 335-36 (N.D. 1962); *Spielman v. State*, 91 N.W.2d 627, 629-31 (N.D. 1958), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994).

The trial court denied Respondent's motion to dismiss, concluding "the doctrine of sovereign immunity . . . is no longer constitutionally based and public policy no longer requires sovereign immunity to protect the state from suit." (Pet. App. at App. 5.) No further action was taken in the case for some time.

On September 13, 1994, in *Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994), the North Dakota Supreme Court changed its long-standing interpretation of N.D. Const. art. I, § 9, overruling the North Dakota cases cited above, and concluded that the court and not just the Legislature had the authority to modify or waive the common law doctrine of sovereign immunity and permit tort suits against the State of North Dakota. *Id.* at 637. Finding that the doctrine of sovereign immunity was

"outdated" and "no longer warranted," the court overruled its prior cases sustaining the doctrine and judicially abolished it. *Id.* at 639. The court limited the retroactive effect of this abrogation, writing:

> [A]lthough we abrogate the State's sovereign immunity from tort liability, we conclude that abrogation should be prospective so that the Legislature can implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance. Accordingly, except as to this case and two contemporaneous cases decided today, *Ferris v. North Dakota Centennial Commission*, 521 N.W.2d 643 (N.D.1994), and *Hosman v. North Dakota State University*, 521 N.W.2d 643 (N.D.1994), we abolish sovereign immunity for claims arising fifteen days after adjournment of the fifty-fourth legislative assembly.

521 N.W.2d at 640 (citations omitted).[1]

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[1] The Fifty-Fourth North Dakota Legislative Assembly adjourned on April 7, 1995. *See* 1995 N.D. Sess. Laws at I, II. Accordingly, the supreme court's abrogation of sovereign immunity in *Bulman* was effective fifteen days later on April 22, 1995, not April 21, 1995, as stated in the Petition at pages 3 and 7. Also, Petitioner asserts – without any citation of authority – that when *Bulman* was decided "some 21 other plaintiffs had tort cases pending against the State of North Dakota in the trial courts of North Dakota." (Petition at 7.) To the best of counsel's knowledge and belief, neither the record in this case nor any other definitive source establishes the specific number of cases against the State or an arm of the State pending in the trial courts at the time of the *Bulman* decision.

On October 17, 1994, Respondent filed a Renewed Motion to Dismiss, arguing that Petitioner's action continued to be barred by sovereign immunity pursuant to the *Bulman* decision and the pre-existing law. The district court denied that motion. Respondent moved the district court to reconsider that denial in light of the North Dakota Supreme Court's recent issuance of supervisory writs in three procedurally similar cases; those writs mandated district court dismissal of tort suits against the State. The district court denied the Motion for Reconsideration. (Pet. App. at App. 6.)

Respondent next filed a Petition for Supervisory Writ in the North Dakota Supreme Court, asking that court to direct the trial court to dismiss Petitioner's action. The supreme court granted the writ and ordered the trial court to dismiss the lawsuit. (Pet. App. at App. 8.) The trial court then entered final judgment in favor of Respondent on sovereign immunity grounds. (Pet. App. at App. 10.) Petitioner filed a timely appeal to the North Dakota Supreme Court. (Record 96 (Notice of Appeal).)

On appeal, the North Dakota Supreme Court entered a decision on June 27, 1995, affirming the judgment of dismissal and rejecting Petitioner's contention that the prospectivity ruling in *Bulman* violated the North Dakota Constitution. (Pet. App. at App. 12-13.)

## REASONS THE PETITION SHOULD BE DENIED

**1. Prior decisions of this Court establish that under the U.S. Constitution the retroactive or prospective application of state court decisions on questions of state law is a matter of state law left to the authority of the state courts. Accordingly, the prospectivity decision of the North Dakota Supreme Court at issue here does not present a substantial federal question that has not been resolved by, or that is in conflict with, a decision of this Court.**

Although Petitioner has attempted to phrase the question presented in terms of Petitioner's federal constitutional rights, the real issue here is state courts' authority to establish their own jurisprudence with regard to retroactivity or prospectivity of their decisions on questions of state law. This Court resolved that issue in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In *Sunburst* the Court established that this is not a federal law question and the Constitution does not require state courts to apply their decisions retroactively.

The primary issue below in *Sunburst* had been the construction of a state statute concerning rail rate regulation. 287 U.S. at 359. In its decision the Montana Supreme Court had overruled *Doney v. Northern Pacific Ry. Co.*, 199 P. 432 (Mont. 1921), *overruled*, 7 P.2d 919 (Mont. 1932), which had interpreted a Montana statute, and then held *Doney* would continue to apply to parties who had relied on that decision; that is, the Montana court held that its decision overruling *Doney* would be effective prospectively. 287 U.S. at 361. The petitioner argued the Montana Supreme Court's prospectivity ruling violated the Federal

Constitution. *Id.* The Court rejected that argument in an opinion authored by Justice Cardozo, writing:

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. *Sound or unsound, there is involved in it no denial of a right protected by the federal constitution.* . . . This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> *We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.* It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute. *The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.* We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring

> common law for those within her borders. . . . If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

*Id.* at 364-66 (emphasis added) (citations omitted) (footnotes omitted).

The *Sunburst* holding was cited with apparent approval by both the plurality and the dissenting opinions in *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990) (*"ATA"*). The plurality opinion stated:

> The determination whether a constitutional decision of this Court is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law. *When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.* See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) . . . .

496 U.S. at 177-78 (plurality opinion) (emphasis added). The dissenting opinion in *ATA* noted: *"Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only." 496 U.S. at 223 n.12 (Stevens, J., dissenting) (quoting *Mackey v. United*

*States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)).

In this case the decision below was based on the North Dakota Supreme Court's decision in *Bulman* abolishing the State's sovereign immunity. The *Bulman* decision was based strictly on state law. *See* 521 N.W.2d at 634-40. It concerned the interpretation of N.D. Const. art. I, § 9, and a re-interpretation of the state common law to permit tort suits against the State. *See* 521 N.W.2d at 634-40. The opinion does not cite or rely upon federal law in its discussion of either sovereign immunity or prospectivity. *See id.* As permitted by *Sunburst*, the North Dakota Supreme Court made its own choice with regard to the limits of adherence to precedent.[2]

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[2] The North Dakota Supreme Court's prospectivity ruling in *Bulman* was the most equitable ruling possible given its substantive decision in that case. Whether or not, as judicial scholars may argue, courts *should* be in the business of "making law," that is what the North Dakota Supreme Court did in this instance. Before the *Bulman* decision long-standing (and well-reasoned) law established that only the Legislature could permit tort suits against the State and no such suits were authorized. See cases cited, supra pp. 1-2. In *Bulman* the supreme court changed that interpretation and went further to *create* a new tort cause of action against the State. The *Bulman* decision is more similar to legislation, which generally has only prospective effect, than to judicial decision-making, which generally has retroactive effect. The supreme court was aware that because of this significant change in the law and State agencies' reliance on the previously well-established law of sovereign immunity, State agencies did not have the resources (or the litigation-prevention measures, such as preservation of putative evidence) in place to defend against possible suits, had *Bulman* been applied retroactively. Although the State would have preferred a "pure" prospectivity ruling in *Bulman*, the State

Petitioner appears to argue that *Sunburst* is no longer good law in light of the recent decisions by this Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("*Beam*"); and that the North Dakota Supreme Court decision below conflicts with those decisions. (Petition at 9-10.) Petitioner's argument is meritless for several reasons.

First, the analysis in this Court's recent retroactivity decisions is irrelevant to the law established in *Sunburst* because those decisions concerned the retroactivity of this Court's decisions on matters of federal constitutional law, not the retroactivity of a state court's decision on a matter of state constitutional law. *See Harper*, 113 S. Ct. at 2513 (concerning retroactivity of this Court's decision that state scheme taxing federal retirement benefits violated federal constitutional doctrine of intergovernmental tax immunity); *Beam*, 501 U.S. at 532 (deciding retroactivity of this Court's decision that state tax statute violated Commerce Clause); *Griffith*, 479 U.S. at 316 (determining retroactivity of this Court's decision that prosecution's use of peremptory challenges to strike jurors based on race constituted racial discrimination in violation of the Fourteenth Amendment); *see also Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995) (regarding retroactivity of this Court's decision that Ohio "tolling" provision was unconstitutional under

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recognized the court's selective prospectivity ruling demonstrated the court appreciated the nature of its decision on the merits, the prior reliance interests that would be jeopardized by retroactive application, and the equities of the situation.

Commerce Clause). Therefore, these decisions are not directly applicable to the issue of a state court's authority to limit the retroactive application of interpretations of state law, the issue here and in *Sunburst*.

Second, to the extent the decisions upon which Petitioner relies even mentioned *Sunburst*, the decisions did not reject the reasoning or result of that case. *See, e.g., Harper*, 113 S. Ct. at 2519 ("The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. *Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law*, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-366 . . . (1932), cannot extend to their interpretations of federal law.") (emphasis added); *Beam*, 501 U.S. at 535 (opinion of Souter, J.) ("Subject to possible constitutional thresholds, see *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court.").[3]

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[3] In *McKesson* the Court held that when a state tax is found to violate the Federal Constitution, the Due Process Clause of the Fourteenth Amendment "obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (footnote omitted). The Due Process concerns raised in *McKesson* are not present in this case, however, because this case involves no "unconstitutional deprivation" under the Federal Constitution. The decision below and the *Bulman* decision were grounded entirely on the North Dakota Supreme Court's interpretation of the North Dakota Constitution and state common law, not the U.S. Constitution.

Third, these recent federal retroactivity decisions were not based on the Equal Protection, Due Process, or Privileges and Immunities Clauses of the Fifth or Fourteenth Amendment to the United States Constitution, but, rather, on "juristic philosophy," "conceptions of the law," or federal constitutional restrictions on the federal judiciary.

For example, Petitioner erroneously argues that the Court's decision in *Griffith*, concerning retroactivity of federal constitutional decisions in criminal cases, was based on the Equal Protection Clause of the U.S. Constitution. (Petition at 9.) However, the prospectivity analysis in the *Griffith* decision does not even mention the Equal Protection Clause. *See* 479 U.S. at 320-28. Instead, the Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," *id.* at 322, on two grounds, *id.* at 322-23: First, the Court found "the nature of judicial review" under U.S. Const. art. III, § 2, precluded the Court from exercising the prerogative to make rules of law retroactive or prospective as the Court saw fit, *id.* at 322-23, and, second, the Court cited

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Also, the prospective application of the *Bulman* decision did not "deprive" Petitioner of any pre-existing right. *See* Petition at 13 ("The issue here is whether [the court] may change the law and then *grant rights and privileges* that flow from that change to some but not to all others similarly situated." (emphasis added)). Under state law no tort cause of action against the State existed until the North Dakota Supreme Court abolished sovereign immunity in *Bulman*. For these reasons, the Due Process Clause concerns expressed in *McKesson* are not relevant here.

the "inequity" of not "treating similarly situated defendants the same," *id.* at 323. *See also Harper,* 113 S. Ct. at 2516.

The other recent federal retroactivity cases also were not grounded on the Fifth or Fourteenth Amendment. In *Beam* Justice Souter's opinion was based on "an issue of choice of law." *Beam,* 501 U.S. at 544 (opinion of Souter, J.). Justice White's concurrence in *Beam* considered several factors, including the *Griffith* decision, but not the Fifth or Fourteenth Amendment. *See* 501 U.S. at 544-47 (White, J., concurring in judgment). Justice Blackmun's *Beam* opinion was grounded on the view that "failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication," as discussed in *Griffith. Id.* at 547 (Blackmun, J., concurring in judgment). The core of Justice Scalia's concurrence was the view that the Constitution restricts the federal judiciary's authority to "make new law." *Id.* at 548-49 (Scalia, J., concurring in judgment).

In *Harper* the Court held that its decision was controlled by *Beam* and that "[a]lthough [*Beam*] did not produce a unified opinion for the Court, a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." 113 S. Ct. at 2517. Again, the Court did not state or even imply that this result was compelled by the Fifth or Fourteenth Amendment.

Therefore, no Supreme Court decision has called into question the constitutionality of state courts' exercise of their authority to establish their own common law with

regard to retroactivity of state law decisions. The North Dakota Supreme Court's prospectivity ruling in *Bulman*, as applied in the decision below, does not conflict with the holding of any Supreme Court case. The decision below does not present an important federal question that has not been, but should be, settled by this Court.

**2. The decision below does not decide an important federal question in a manner that conflicts with a decision of another state court of last resort or of a United States court of appeals.**

As discussed above, this case involves a question of state law and no important federal question is presented here. In addition, the relevant decision below does not conflict with any decision of a state court of last resort or of a United States court of appeals. Indeed, the undersigned counsel has been unable to locate any state or federal case holding that *Griffith*, *Beam*, or *Harper*, or the Fifth or Fourteenth Amendment to the United States Constitution prohibits full or limited prospective application of a state judicial decision concerning a question of state law.

To the contrary, state courts that have considered the issue since issuance of *Harper* or *Beam* have consistently held that state courts may establish their own law with regard to retroactivity and need not follow this Court's federal retroactivity analysis in deciding state law questions. *See, e.g., Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 112 & n.7 (Colo. 1992); *Montells v. Haynes*, 627 A.2d 654, 661 (N.J. 1993); *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1380-82 (N.M. 1994); *City of New*

*Bern v. New Bern-Craven County Bd. of Educ.*, 450 S.E.2d 735, 743 (N.C. 1994); *Carrollton-Farmers Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist.*, 826 S.W.2d 489, 515-19 & n.33 (Tex. 1992); *Kennecott Corp. v. State Tax Comm'n*, 862 P.2d 1348, 1349-52 (Utah 1993) (also holding selective prospectivity does not violate the Due Process Clause, *id.* at 1353); *Kincaid v. Mangum*, 432 S.E.2d 74, 83-86 & n.14 (W. Va. 1993).

Since *Harper* and *Beam* many other state courts have continued to apply their own retroactivity/prospectivity tests in deciding whether to limit the retroactive application of decisions on state law questions without even questioning the application of *Harper*, *Beam*, or the Fifth or Fourteenth Amendment to this issue. *See, e.g., Hickel v. Halford*, 872 P.2d 171, 183-85 (Alaska 1994); *Wilderness World, Inc. v. Department of Revenue*, 895 P.2d 108, 113 (Ariz. 1995); *Howard v. Thrifty Drug and Discount Stores*, 895 P.2d 469, 476 n.3 (Cal. 1995); *Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1210-12 (Del. 1992); *City of Miami v. Bell*, 634 So.2d 163, 165-66 (Fla.), *cert. denied*, 115 S. Ct. 316 (1994); *Fager v. Hundt*, 610 N.E.2d 246, 252-53 (Ind. 1993); *Jones v. Hansen*, 867 P.2d 303, 311 (Kan. 1994); *Oliver v. Schultz*, 885 S.W.2d 699, 702 (Ky. 1994); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657-58 (Md. 1992); *Robinson v. Stewart*, 655 So.2d 866, 868 (Miss. 1995); *Brockie v. Omo Constr., Inc.*, 887 P.2d 167, 171 (Mont. 1994); *King v. Cuomo*, 613 N.E.2d 950, 954-55 (N.Y. 1993); *Landmark Medical Center v. Gauthier*, 635 A.2d 1145, 1152-54 (R.I. 1994); *Hardaway v. County of Lexington*, 443 S.E.2d 569, 570-71 (S.C. 1994); *Larsen v. Sioux Falls Sch. Dist. No. 49-5*, 509 N.W.2d 703, 705-09 (S.D. 1993); *Vermont Acc. Ins. Co. v. Howland*, 648 A.2d 819, 820 (Vt. 1993); *City*

*of Richmond v. Blaylock*, 440 S.E.2d 598, 598-99 (Va. 1994); *A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.*, 515 N.W.2d 904, 911 (Wis. 1994); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).

There is no conflict among state and federal courts concerning state courts' authority to establish their own common law with regard to retroactivity of state court decisions on matters of state law.

There is, therefore, no substantial federal question as to whether a state court decision that a change in state law will be prospective for all parties other than those immediately before the court violates "the Equal Protection and Privilege's Immunities [sic] Clauses of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Fifth and Fourteenth Amendments" (Petition at i).

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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